counts, all relating to the factual scenario described above.[2] Each count charged four defendants: GAF and Sherwin, as well as GAF Chemicals Corporation and Jay & Company, each a wholly owned subsidiary of GAF. The first trial began December 21, 1988. After only a few days of testimony, the district court granted defendants' motion for a mistrial based upon late disclosure to the defense of an expert's report indicating that a portion of a document from the files of GAF had been altered with typewriter correction fluid. Defendants thereupon moved to dismiss the indictment on double jeopardy grounds and to stay a retrial pending appeal of the double jeopardy issue. The district court denied these motions. On January 12, 1989, this Court denied defendants' motion to stay further proceedings in the district court. In his capacity as Circuit Justice, Justice Thurgood Marshall denied defendants' stay application on January 25, 1989.

The second trial commenced January 31, 1989. After six weeks of testimony, jury deliberations began on March 11, 1989. Twelve days later, the jurors announced that they were deadlocked, and the court declared a second mistrial. On

[2]Prior to the first trial, Count Ten of the Indictment, charging the defendants with receiving unlawful margin loans in violation of 15 U.S.C. §§ 78g(f)(1), 78ff, 12 C.F.R. §§ 224.1 et seq., and 18 U.S.C. § 2, was dismissed on the government's motion. At the close of the government's case at the second trial, Count Five of the Indictment, charging the defendants with a post-manipulation sale of five million shares of Union Carbide stock on November 10, 1986 in violation of 15 U.S.C. §§ 78j(b), 78ff, 17 C.F.R. § 240.10b-5, and 18 U.S.C. § 2, was dismissed on the government's motion.

August 30, 1989, this Court affirmed the district court's denial of defendants' motion to dismiss the indictment on double jeopardy grounds. United States v. GAF Corporation, 884 F.2d 670 (2d Cir. 1989).

Jury selection in the third trial began on October 24, 1989, and testimony began November 13, 1989. The trial concluded on December 13, 1989 when the jury returned guilty verdicts against defendants Sherwin and GAF on all counts, and acquitted defendants GAF Chemical and Jay & Company, Inc. Apellants' claims stem from events and rulings in connection with the third trial.

3. THE APPEAL

Before the first trial, in response to the defendants' request the government filed a bill of particulars on September 23, 1988. This bill detailed, among other matters, the date, number of shares, price per share, and stock exchange for each of the transactions referred to in those portions of the Indictment alleging that defendants had engaged in a series of transactions on a national securities exchange by fraudulent and manipulative means. According to this bill, this series of transactions was comprised of trades in Union Carbide stock on October 29 and 30, and November 6 and 7, 1986.

At the second trial, the defense argued that if there was reasonable doubt about whether defendants -- as opposed to Jefferies -- were responsible for the November purchases, then there must be such doubt about whether the defendants were

responsible for the October trades. The government, in rebuttal summation, argued that the November trades were not in the Indictment. In response, the defense asked for, and the court gave, an instruction stating that the "series of transactions" charged in the indictment included both the October and November trades. The court also read from the original bill of particulars. As noted, the jury was unable to reach a verdict.

On October 6, 1989, between the second and third trials, the government filed an amended bill of particulars which included only the October 29 and 30 trades in the charged series of transactions. At the third trial, during appellants' cross examination of Jefferies, they sought to introduce the government's original bill of particulars. Judge Lowe denied this offer, stating that a bill of particulars is not a pleading, and the government is not bound by it. Judge Lowe further noted that the government has absolute discretion to determine the contents of what it chooses to prove in a criminal case, as well as the absolute discretion to withdraw any proof it chooses. Finally, Judge Lowe noted that a bill of particulars is not evidence in a case, and that there is no doctrine of admissions "against the government the same as there would be against civil litigants or against defendants in a criminal case."

During the trial, portions of testimony and exhibits described the November transactions. In summation, the appellants argued that the trading patterns by Jefferies &

Company in the November transactions were identical to those in October, and that since Jefferies was responsible for the November trades, he, rather than Sherwin, must also have been responsible for the October trades. Defense counsel called the November trades "the key to the puzzle . . . ."

On rebuttal summation, the government addressed the defense contentions. The government argued "[t]he November purchases of Union Carbide stock by Jefferies & Company is another smokescreen. The defendants want you to focus on the November purchases so that you don't look at the October purchases." The government pointed out what it perceived were differences between the October and November trades, and then noted "there is another essential difference between the October purchases and the November purchases. The November purchases are not in this indictment. The October purchases are in this indictment." The government also stated that "this case is not about the November trades."

On the Monday following the government's rebuttal summation, defendants requested in writing the following curative instruction:

> In its rebuttal summation, the government argued that the defendants' references to Jefferies' November purchases of Union Carbide were a smokescreen. I instruct you that you may consider the evidence of the November purchases in reaching your conclusion as to who was responsible for the October purchases of Union Carbide.

The court denied defendants' request, responding "I deny that. I just don't even need argument on that."

(a) The Bill of Particulars

Appellants assign as error Judge Lowe's denial of defendants' motion to introduce the Government's original bill of particulars into evidence when cross-examination of Jefferies began. Appellants urge that the original bill, which included the November transactions as unlawful conduct attributable to Sherwin and GAF, constitutes an admission of a party-opponent under Federal Rule of Evidence 801(d)(2), and should have been admitted for the jury's consideration. Specifically, appellants contend that the government's original version of the events, which linked the October and November trades, had been discredited at the second trial and the government, therefore, deliberately adopted fundamental changes in its version of the facts in order to enhance its chances of success.

Federal Rule of Evidence 801(d)(2) provides, in relevant part, that a statement is not hearsay if "the statement is offered against a party and is (A) the party's own statement, in either an individual or representative capacity or (B) a

be admissible against a client. Id. at 30. We noted that "statements made by an attorney concerning a matter within his employment may be admissible against the party retaining the attorney," id. (quoting United States v. Marziotta, 662 F.2d 131, 142 (2d Cir. 1981), cert. denied, 103 S.Ct. 1891 (1983)), and that this proposition extends to arguments counsel make to the jury. Id.; see also Oscanyan v. Arms Company, 103 U.S. 261, 263 (1880). We also noted that "[a]n admission by a defense attorney in his opening statement in a criminal trial has also been held to eliminate the need for further proof on a given element of an offense." Id. (citing Dick v. United States, 40 F.2d 609, 611 (8th Cir. 1930)).

In McKeon, the defendant's attorney argued to the jury, in his opening statement in the second trial in the matter, that the evidence would show that his client had innocently assisted packing certain crates, and that another individual was actually responsible for an alleged unlawful shipment of weapons. McKeon, 738 F.2d at 28. In a third trial, however, this attorney's opening statement depicted his client's role in the offense differently. Id. The prosecution moved to admit into evidence the contradictory portion of the defense attorney's opening statement from the second trial. Id. The trial judge admitted this statement as an admission of a party opponent. Id. at 29.

We affirmed this Ruling, noting that there was no per se rule against the admission of inconsistent prior opening

statements. Id. at 31. "To hold otherwise would not only invite abuse and sharp practice but would also weaken confidence in the justice system itself by denying the function of trials as truth-seeking proceedings." Id. Most significantly, as support for the conclusion reached in McKeon, this Court noted that the law is quite clear that superseded pleadings in civil cases may constitute admissions of party opponents, admissible in the case in which they were originally filed, as well as any subsequent litigation involving that party. Id. (citations omitted). "A party thus cannot advance one version of the facts in its pleadings, conclude that its interests would be better served by a different version, and amend its pleadings to incorporate that version, safe in the belief that the trier of fact will never learn of the change in stories." Id. This Court quoted extensively from Judge Swan:

> A pleading prepared by an attorney is an admission by one presumptively authorized to speak for his principal . . . . When a pleading is amended or withdrawn, the superseded portion ceases to be a conclusive judicial

this Court in Andrews v. Metro-North, 882 F.2d 705 (2d Cir. 1989). There, we wrote that a district court's refusal to permit jurors to be informed of an amendment to a complaint, and

inform a defendant of charges with sufficient precision to allow preparation of a defense, to avoid unfair surprise, and to preclude double jeopardy. See Wong Tai v. U.S., 273 U.S. 77, 82 (1927); U.S. v. Bortnovsky, 820 F.2d 572, 574 (2d Cir. 1987). A bill of particulars is a statement of what the government will or will not claim in its prosecution. Murray, 297 F.2d at 819.

We think that the same considerations of fairness and maintaining the integrity of the truth-seeking function of trials that led this Court to find that opening statements of counsel and prior pleadings constitute admissions also require that a prior inconsistent bill of particulars be considered an admission by the government in an appropriate situation. Although the government is not bound by what it previously has claimed its proof will show any more than a party which amends its complaint is bound by its prior claims, the jury is at least entitled to know that the government at one time believed, and stated, that its proof established something different from what it currently claims. Confidence in the justice system cannot be affirmed if any party is free, wholly without explanation, to make a fundamental change in its version of the facts between trials, and then conceal this change from the final trier of the facts. See McKeon, 738 F.2d at 31.

It is no answer to reply, as the government suggests, that as it reevaluates the strength or significance of its evidence, it may change the "contours" of its case before trial, and is free under Fed. R. Crim. P. 7(f) to amend its bill as justice

requires. A party in a civil case may also reevaluate his view of the evidence, and amend his complaint "when justice so requires" pursuant to Fed. R. Civ. P. 15(a). And, as the cases described above have shown, it is a substantial abuse of discretion not to allow the jury to be aware that a complaint has been amended, and to examine the prior complaint. Andrews, 882 F.2d at 707.

The government also urges that a bill is not an authoritative adoption by the government of the facts specified therein, but rather a statement of the facts the government intends to prove at trial. Aside from the obvious similarity such a description bears to a complaint in a civil matter, or to counsel's argument in McKeon, the government also twice suggests that the original bill should be treated in the same manner as an indictment which has been superseded, and not admissible as evidence of the later indictment's infirmity. Govt's brief at 24-25 (citing Falter v. United States, 23 F.2d 420, 425 (2d Cir.), cert. denied, 277 U.S. 590 (1927)).

The government's arguments are without merit. Judge Learned Hand, in the case cited by the government, pointed out that an indictment is not a pleading of the United States. Falter, 23 F.2d at 425. He noted that an indictment is "the charge of a grand jury, and a grand jury is neither an officer nor an agent of the United States, but a part of the court." Id. "The United States neither selects nor controls [the grand jury], nor has anything to do with it, but to present to it its

evidence." Id. A bill of particulars, on the other hand, is prepared, reviewed, and presented by an agent of the United States. Indeed, whereas the indictment in this case was signed by the foreman of the grand jury, along with the United States Attorney, and begins "[t]he Grand Jury charges: . . . ", the bill of particulars is signed by the Assistant United States Attorney who tried this case, and begins "[t]he Government submits . . . ." Thus, the government's suggestion that the

October and November deceptions. Nevertheless, in view of the government's repeated contentions in the third trial that the November trades were significantly different from the October ones, and, especially in view of the government's argument that the defense contentions concerning the November trades were a

validity of the rule. Id.

For all of these reasons, we believe the district court should have permitted the jury to examine the government's prior bill of particulars. Although the Court in no way suggests that the government should not be able to amend its bill of particulars as it sees fit, we do hold that, if the government chooses to change its strategy at successive trials, and contradict its previous theories of the case and version of the historical facts, the jury is entitled to be aware of what the government has previously claimed, and accord whatever weight it deems appropriate to such information. There is merit still in that "rough and ready" view of the adversary process which leaves parties to bear the consequences of their own acts. Whether Judge Lowe's Ruling denying the admission of the bill constitutes reversible error in itself in this case is a

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inconsistency are fair ones, and that innocent explanations do not exist. Id.

Here, all of these criteria are met. The inconsistency between the first bill's claim that the November trades constituted part of the defendants' illegal activities, and the government's subsequent argument that the November trades are a smokescreen, not linked to the defendants' illegal activities, is clear. Although the government is its own client, a bill of particulars is presumably prepared from a review of what the evidence will show, and, therefore, the government's statements are the functional equivalent of what the testimony will be. Finally, although in McKeon Judge Winter suggested that a hearing should be held to determine what inferences are sought to be drawn by introducing the admission, and whether there is an innocent explanation for the inconsistency, 738 F.2d at 33, here the inconsistency is plain, the inferences are clear, and the government itself has offered an explanation -- that it no longer believes that the evidence demonstrates that the two trading periods are necessarily linked. Accordingly, none of the considerations described in McKeon suggest restricting the use of the earlier bill.

question we need not reach, since further events compounded the effect of this Ruling.

(b) The Refused Instruction

This Court has repeatedly recognized a criminal defendant's right to a jury charge which reflects the defense theory. United States v. Dove, 916 F.2d 41, 47 (2d Cir. 1990)("[A] criminal defendant is entitled to instructions relating to his theory of defense, for which there is some foundation in the proof, no matter how tenuous that defense may appear to the trial court."); United States v. Durham, 825 F.2d 716, 718 (2d Cir. 1987); see e.g., United States v. Pedroza, 750 F.2d 187, 205 (2d Cir. 1984)(quoting United States v. O'Connor, 237 F.2d 466, 474 n.8 (2d Cir. 1956))("[i]t is well established that '[a] criminal defendant is entitled to have instructions presented relating to any theory of defense for which there is any foundation in the evidence, no matter how weak or incredible that evidence may be."')). In Durham, this Court noted that this rule was widely accepted throughout the Circuits. 825 F.2d at 719 (citing United States v. Plummer, 789 F.2d 435, 438 (6th Cir. 1986); United States v. Wellington, 754 F.2d 1457, 1463 (9th Cir. 1985), cert. denied, 474 U.S. 1032 (1986); United States v. Hyman, 741 F.2d 906, 912 (7th Cir. 1984)).

In this case, appellants at all times claimed that they were not responsible for the October trades, and that evidence of their innocence could be found by looking at the November trades. They argued that since the evidence suggested that

Jefferies, rather than Sherwin, was responsible for the November trades, and since the two series of trades were virtually identical, and linked, the jury should have examined the November trades in determining who was responsible for the October trades. On appeal, appellants contend that the combination of the court's exclusion of the original bill of particulars, and the government's rebuttal summation in which it labelled the appellants' contention a smokescreen and stressed that the jury should not look to the November trades since they were not included in the indictment, had the effect of indicating to the jury that consideration of the November trades was improper and inappropriate. Moreover, appellants urge that this situation should have been remedied by the instruction which they urged the court to give, see supra p. 12, and that the court's failure to accept the defendants' written suggestion, submitted before the court charged the jury, left the court's actual charge incomplete and unfair, in light of the

"defendants contend that Jefferies & Company did not act as their agent since they did not request Jefferies & Company to act in their behalf, nor did they guarantee Jefferies & Company against loss, nor did they authorize Jefferies & Company to use its discretion in making the trades of October 29 and 30 for the benefit of the defendants." In another context, the court also instructed the jury that "[a]ny of the statements or acts of" Sherwin, Heyman, Jefferies and Melton, as well as the defendant corporations "may be considered . . . in deciding the issues relevant to this case." While the government urges that

rebuttal summation, simply compounded the effect of the district court's erroneous ruling.

For all of the reasons described above, we hold that, in order to have fairly apprised the jury that it was entitled to review the November trades, especially in view of the court's ruling concerning the original bill of particulars, and the government's rebuttal summation, the district court should have instructed the jury about the November trades as requested.[4]

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[4] We do not here hold that the prosecutor's rebuttal summation itself was so improper as to require reversal. It is well established that a prosecutor is ordinarily entitled to respond to the evidence, issues, and hypotheses propounded by the defense. United States v. Marrale, 695 F.2d 658, 667 (2d Cir. 1982), cert. denied, 460 U.S. 1041 (1983). Nevertheless, as we have stated above, in view of the prosecutor's comments that the November trades were not in the indictment, that the defendants' arguments were merely a smokescreen, and that the case was not about the November trades, all contradicting the original bill of particulars which he filed, we do hold that the Court was obliged to instruct the jury that it was entitled to consider the defendant's evidence concerning the November trades in order to dispel the strong implication raised by the prosecutor's statements that such evidence should not be reviewed.

CONCLUSION

We find that the combination of these two errors -- that the district court, on the facts of this case, should have admitted the original bill of particulars, and that the court should have given an instruction similar to the one requested by the defendants in light of the prosecutor's rebuttal summation -- precluded the defendants from receiving fair consideration of their defense and constitutes reversible error. San Alfonso-Pagan, 535 F.2d at 1357. For the reasons set forth above, the judgments of conviction are hereby REVERSED and the matter is REMANDED to the district court for retrial. The Court need not consider appellants' numerous other contentions which will not likely arise in exactly the same context in any new trial.

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Nos. 90-1352, 90-1353

MAR 12 1991

Altimari, Circuit Judge, concurring:

I write separately out of concern that the breadth and scope of Judge Daly's opinion might lead some to assume that a bill of particulars is a document that may routinely be offered and received into evidence. In my view, such a conclusion would be unwarranted.

The defendants-appellants sought to introduce the government's original bill of particulars to demonstrate the similarity of the October and November stock transactions. Judge Lowe denied the offer. On its face, this ruling was proper. Under the unique circumstances of this case,

must determine whether the circumstances of a particular case are sufficiently compelling to necessitate admission. In all other respects, I agree with Judge Daly's well-reasoned opinion.

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MAHONEY, Circuit Judge, dissenting:

My colleagues conclude that the district court erred (1) by excluding from evidence the government's prior bill of particulars,

counsel, in the course of cross-examination of Boyd Jeffries, sought a ruling on the admissibility of the original bill:

> MR LEVINE: We would like to offer in evidence the amended bill of particulars and the original bill of particulars, and confront Mr. Jaffries with the fact -- well, we want to be able to offer the original bill and the amended bill and use them for argument in the case.
>
> THE COURT: For what purpose?
>
> MR. LEVINE: The principal purpose, your Honor, is that the bill of particulars takes a different position with respect to the purchases on the 6th and 7th than the government's only witness who tells them about the purchases.
>
> THE COURT: That may be so, but you are going to offer the bill of particulars to prove what?
>
> MR. LEVINE: To prove that it was the government's position that the purchases on the 6th and the 7th were not made at the direction of GAF and Mr. Sherwin as alleged originally in the indictment.

Counsel summarized the intended use of the bill as follows:

> The particular importance here is that the government is taking the position in this trial not to charge the defendants with the November 6th and 7th purchases, relying on the same witnesses, the same testimony, and basically the same evidence that it did in the first and the second trial. This is a retrial. We believe we are entitled to put before the jury the argument that they believe their witnesses less, that they are vouching

less for their witnesses and that testimony by amending the bill of particulars. That is the argument we would like to make.

I cannot agree with my colleagues that the district judge abused her discretion by excluding the bill. The evidentiary worth of the bill was limited to the proposition, as argued by defense counsel, that the government no longer believed it could prove that the November trades were part of the manipulative scheme charged. In my view, the fact that the government once thought it could prove beyond a reasonable doubt that the November trades were part of a larger manipulative scheme bears little relevance to the question whether Sherwin and GAF instigated concededly manipulative trading in October. Judge Altimari correctly observes that "[b]ills of particulars are generally of minimal probative value, and will tend to confuse the issues and mislead the jury if admitted as evidence." This case is no exception. Further, as we said recently in United States v. Scarpa, 913 F.2d 993, 1015 (2d Cir. 1990):

> [W]e recognize "the long held view of this Circuit that the trial judge is in the best position to weigh competing interests in deciding whether or not to admit certain evidence." United States v. Sun Myung Moon, 718 F.2d 1210, 1232 (2d Cir. 1983)(citing United States v. Birney, 686 F.2d 102, 106 (2d Cir. 1982)), cert. denied, 466 U.S. 971, 104 S. Ct. 2344, 80 L.Ed.2d 818 (1984). "Absent an abuse of discretion, the decision of the trial judge to admit or reject evidence will not be overturned by an appellate court." Id. (citing Birney, 686 F.2d at 106).

The majority places primary reliance upon United States v. McKeon, 738 F.2d 26 (2d Cir. 1984). In McKeon, defense counsel, during the opening statement at a criminal trial, declared that expert testimony would prove that crucial documents had not been prepared on a copying machine located at the bank where the defendant's wife worked. At a retrial, however, counsel's opening statement set forth a new version of the facts, explaining that the defendant had asked his wife to prepare the copies at the bank. We held that the altered version was fairly attributable to the defendant, 738 F.2d at 33-34, and that the trial court properly admitted at the later trial the contradictory promise of proof at the prior trial as "evidence of fabrication demonstrating consciousness of guilt." Id. at 34.

I agree with my colleagues that, under McKeon, there is no per se rule against the admission of bills of particulars. Nonetheless, two of the three limits that McKeon articulated for the use of prior opening statements, see 738 F.2d at 33, weigh decidedly against admitting the bill in our case.

Most fundamentally, I do not see any "assertion of fact inconsistent with similar assertions in a subsequent trial," McKeon, 738 F.2d at 33, in this case. McKeon involved an assertion at the first trial that certain documents had not been prepared on a certain copying machine, and a flatly contradictory declaration at the second trial that they had been so prepared. Here, by contrast,

the government simply revised its theory regarding what it could establish, in terms of a series of fraudulent or manipulative transactions, by introducing substantially the same evidence at the third trial that it had utilized at the second trial. It also seems to me that this rationale is an "innocent explanation" within the meaning of the third McKeon requirement, 738 F.2d at 33.

McKeon posited these limitations because "the evidentiary use of prior jury argument must be circumscribed in order to avoid trenching upon other important policies." Id at 32. I see the same necessity regarding the evidentiary use of prior bills of particulars, and thus discern no reversible error in the district court's ruling on this issue.

B. The Requested Instruction.

After the government's rebuttal summation, the defendants asked for, and were denied, an instruction that the jurors "may consider the evidence of the November purchases in reaching [their] conclusion as to who was responsible for the October purchases of